

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of VIORELIA KIRIT and
GEORG KIRIAK.

VIORELIA KIRIT-KIRIAK,

Appellant,

v.

GEORG KIRIAK,

Respondent.

G040098

(Super. Ct. No. 01D005300)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County,
Mark Millard, Judge. Appeal dismissed.

John R. Schilling for Appellant.

Jennifer J. King; Dawn E. Wardlaw; Law Offices of Marjorie G. Fuller and
Marjorie G. Fuller for Respondent.

In June 2006, appellant Viorelia Kirit-Kiriak filed an order to show cause which, in part, sought to modify the spousal support provision contained in the parties' previously entered judgment on reserved issues. A hearing on the order to show cause was continued several times. On November 8, 2007, the court, at respondent's request, ordered the matter off calendar because appellant had failed to file the required updated income and expense declaration. Appellant moved to set aside the November 8 ruling under Code of Civil Procedure section 473. On February 15, 2008, the court denied the motion. Appellant brought this appeal from the latter ruling.

Concerned the appeal had been taken from a nonappealable order, we directed the parties file letter briefs on the issue. After receiving those briefs, we informed the parties the issue of appealability would be decided in conjunction with the decision on the appeal. We now conclude the appeal should be dismissed.

DISCUSSION

"There is no federal or state constitutional right to appeal. [Citations.] Further, the California Supreme Court has repeatedly held that the right to appeal is wholly statutory. [Citations.]" (*In re Marriage of Levine* (1994) 28 Cal.App.4th 585, 587-588; see also *Walker v. Los Angeles County Metropolitan Transp. Authority* (2005) 35 Cal.4th 15, 19 ["Generally, no order or judgment in a civil action is appealable unless it is embraced within the list of appealable orders provided by statute"].)

Appellant first contends she appealed from the February 15 order denying her motion for relief under Code of Civil Procedure section 473 and the denial of this statutory motion is appealable. In this circumstance appellant is incorrect.

To prevent the circumvention of time limits for taking an appeal and to preclude duplicative appeals from essentially the same ruling, an order denying a motion to vacate a judgment is generally not appealable. (*Spellens v. Spellens* (1957) 49

Cal.2d 210, 228-229; *Mather v. Mather* (1943) 22 Cal.2d 713, 720.) An exception to this rule exists for motions made on one of the grounds allowed under Code of Civil Procedure section 473. (*Spellens v. Spellens, supra*, 49 Cal.2d at p. 229; see also *In re Marriage of Simmons* (1975) 49 Cal.App.3d 833, 837.) “In those cases *where the law makes express provision for a motion to vacate*—as under section 473 . . . of the Code of Civil Procedure—an order denying such motion is regarded as a ‘special order made after final judgment’ and as such is appealable [Citations.]” (*Winslow v. Harold G. Ferguson Corp.* (1944) 25 Cal.2d 274, 282.)

But this exception does not apply to a motion under Code of Civil Procedure section 473 that seeks to set aside a prior nonappealable ruling. “Considering the appeal from the order denying the motion to vacate the judgment under section 473 of the Code of Civil Procedure, as a thing prohibited directly may not be done indirectly, it is the general rule that an appeal may not be taken from a nonappealable order by the device of moving to vacate the order and appealing from a ruling denying the motion. [Citations.]” (*Litvinuk v. Litvinuk* (1945) 27 Cal.2d 38, 43-44.)

To satisfy the latter requirement appellant argues the November 8 order taking the order to show cause off calendar is appealable as an order entered after a final appealable judgment. (Code Civ. Proc., § 904.1, subd. (a)(2).) We disagree.

“[N]ot every postjudgment order that follows a final appealable judgment is appealable. To be appealable, a postjudgment order must satisfy two additional requirements. . . . [¶] The first requirement . . . is that the issues raised by the appeal from the order must be different from those arising from an appeal from the judgment. [Citation.] [¶] The second requirement . . . is that ‘the order must either affect the judgment or relate to it by enforcing it or staying its execution.’ [Citation.]” (*Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 651-652, fn. omitted.)

Respondent concedes the existence of a prior final appealable judgment and that the issues presented in this appeal are different from those that would have been

presented on an appeal from the judgment. But he contends the last requirement, that the November 8 order affect the judgment or relate to it by either enforcing or staying its execution, “cannot be satisfied.”

In *Lakin v. Watkins Associated Industries*, *supra*, 6 Cal.4th 644, the Supreme Court conducted a “review [of] those [orders] we have held did not affect the judgment or relate to its enforcement, and hence were not appealable,” and concluded “[a]ll are orders that, although following an earlier judgment, are more accurately understood as being preliminary to a later judgment, at which time they will become ripe for appeal.” (*Id.* at p. 652.) Alternatively, *Lakin* noted “we have held appealable postjudgment orders making a final determination of rights or obligations of parties even though they did not necessarily add to or subtract from the judgment.” (*Id.* at p. 653.)

In *re Marriage of Ellis* (2002) 101 Cal.App.4th 400 applied this rule, dismissing an appeal from a postjudgment order that found a community interest in the husband’s postretirement participation in his former employer’s health care plan and set a hearing to value the interest. The appellate court held, since “the order determines that the trial court has authority to evaluate and divide the medical subsidy, but it is only preliminary to *actually* doing so,” it “could be reviewed upon appeal from the subsequent final judgment on reserved issue that actually divides the asset.” (*Id.* at p. 403.)

In this case, the order appellant sought to set aside was the November 8 decision to take off calendar her order to show cause to modify the judgment’s spousal support provision. We conclude this ruling constitutes, at best, a preliminary nonappealable order. “A court calendar is a list of causes awaiting hearing on motion or trial. . . . The court for good cause has discretion in the control and regulation of its calendar or docket. [Citation.] It is permissible for good cause to delay a trial or hearing to a later date or to drop or strike a case from the calendar, to be restored on motion of one or more of the litigants or on the court’s own motion.” (*Guardianship of Lyle* (1946) 77 Cal.App.2d 153, 155-156; accord *R & A Vending Services, Inc. v. City of Los Angeles*

(1985) 172 Cal.App.3d 1188, 1193-1194.) Thus, courts have recognized “[a]n off-calendar order is not equivalent to a dismissal and does not divest the court of the jurisdiction which it has acquired. [Citations.]” (*Guardianship of Walters* (1951) 37 Cal.2d 239, 244; see also *Guardianship of Lyle*, *supra*, 77 Cal.App.2d at p. 156 [“‘Off’ merely means a postponement whereas a ‘dismissal’ in judicial procedure has reference to a cessation of consideration”].)

Citing Family Code section 4333 [an “order for spousal support . . . may be made retroactive to the date of filing . . . or to any subsequent date”], appellant claims the order taking her order to show cause off calendar is appealable because, in response to her counsel’s inquiry, the court “commented “[y]ou may lose the date of filing,” and declined to make the order to show cause “subject to restoration.” He argues “[a] subsequently re-filed [order to show cause] could only seek retroactivity back to the new filing date[,]” not the June 2006 date when she filed the original order to show cause.

We disagree. At the November 8 hearing, the court had the discretion to continue the matter, rule on the merits of appellant’s order to show cause, or take it off calendar. The court chose the latter remedy. Having done so, the court could not then proceed to issue an order that effectively ruled on the order to show cause’s merits. Thus, we treat the court’s comments in response to counsel’s inquiries about retroactivity as mere surplusage. Appellant’s assertion the November 8 order “permanently eliminated [her] request for retroactive support for the 16 month period from June . . . 2006” is incorrect. When the parties finally get around to trying whether the spousal support award should be modified, in the event appellant succeeds in obtaining relief, the court may direct the modification be made retroactive to June 2006.

Consequently, the November 8 order is merely preliminary to a later ruling on the merits of the order to show cause and thus not appealable. As a result, the February 15 order denying her motion for relief under Code of Civil Procedure section 473 is also not appealable.

Appellant requests we treat her appeal as a writ petition and decide it on the merits. “Though we thus have power to treat the purported appeal as a petition for writ of mandate, we should not exercise that power except under unusual circumstances.” (*Olson v. Cory* (1983) 35 Cal.3d 390, 401.) No unusual circumstances exist in this case. As noted, it is not clear the trial court will ultimately rule in appellant’s favor on her request to modify the spousal support award. Unlike the situation presented in *Olson*, the appealability of the trial court’s rulings is not subject to serious dispute. Throughout this appeal, respondent has opposed a decision on the merits. Finally, the parties have displayed a noticeable absence of alacrity in seeking to resolve the spousal support modification issue and present no reason to expedite appellate review of the trial court’s rulings to date. Therefore, we decline to treat this appeal as a writ petition.

DISPOSITION

The appeal is dismissed. Respondent shall recover his costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

MOORE, J.

IKOLA, J.